STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 3, 2014
v	No. 313743 Roscommon Circuit Court
JASON JOSEPH RICHARDSON, Defendant-Appellant.	LC No. 12-006589-FH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his criminal convictions following a jury trial of home invasion in the first degree, MCL 750.110a(2), felonious assault, MCL 750.82, and carrying a concealed weapon, MCL 750.227, following a jury trial. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 20 to 40 years' imprisonment for the home invasion conviction, and 3 to 15 years' imprisonment for the other two convictions, all sentences to be served concurrently. Because the trial court plainly erred in giving unduly coercive supplemental jury instructions, we reverse and remand for a new trial.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case was tried on October 11 and 12, 2012. The prosecution accused defendant of breaking into his former girlfriend Ashly Parker's house and punching Norman Pratt, another former boyfriend of Parker's, with brass knuckles. Parker, Pratt, and Roscommon County Deputy Sheriff Angela Ackley were the only witnesses who testified at trial, and eleven exhibits were introduced into evidence. Pratt's testimony inculpated defendant, while Parker's testimony was beneficial to defendant.[1] After closing arguments and final jury instructions were presented

[1] Parker testified that defendant did not break into her home. She had him over before Pratt arrived, asked him to leave so that she could talk to Pratt about Pratt's trouble with a woman, and then defendant arrived later, knocked on the door, and she waved him in, as she never locks her door. She testified that defendant also had a key to her apartment, as he lived across the street and helped care for her dogs when she was out of town. After defendant arrived, he and Parker proceeded to her bedroom, where Pratt was, to talk out of earshot of her daughter, who was

to the jury on Friday morning, the 12th, the jury left the courtroom at 10:26 a.m. to begin deliberating.

A. First Supplemental Jury Instructions

At 1:40 p.m., outside the presence of the jury but with counsel present, the trial court indicated that the jury had sent out a note:

> Prior to going on the record, I shared the note from the jury. Is it possible to see a transcript of preliminary—a transcript of the preliminary transcript with the testimony of Ashly Parker?
>
> The long and short, the answer is "No." Evidence is closed. Any reference that was made to it was in questions. The only evidence is the testimony of the three witnesses and the eleven exhibits. As discussed by counsel, there's things in that transcript that don't apply. It was objected to. There is no way that—I'm not going to redact it. And I'm going to indicate that they should be reread 3.5, which says that—what is evidence. And I'm probably going to go over that with them.
>
> And I'm going to read them paragraphs two, three, four, six, and seven of the deadlock jury instruction. It's just—I'm not going to read them one. I'm just going to read them two—two, three, four, six, and seven, I think. I'm not going to read the one saying they can submit a list of the problems they're having troubles with, because I don't to—I don't want [to] have a series of frigging notes. Okay? I'm just going to say that they've got to do it.

The court then asked, "You're, counsel, in agreement." Both answered that they were.

At 1:42 p.m., the jury entered the courtroom. While subsequently addressing the jury, the trial court stated, "I see a scribbled-out 'we are.' And I assume that that means you're going to say we are deadlocked. But you don't determine whether you're deadlocked or not, I do. Okay?" After reinstructing the jury on what constitutes "evidence," the court gave the following deadlocked jury instruction:

> Now, I'm going to give you some additional instructions. Okay?

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sleeping on the couch in the living room. Defendant and Pratt then commenced arguing and Parker testified that she left the room at that point, so she did not know "who hit who first." She denied screaming, "why did you hit him with brass knuckles," claiming Pratt said that, not her. She testified that brass knuckles were left at her house after a party, apparently by Pratt's brother, and she placed them in her bedroom drawer where "anybody" could access them. She was cross-examined with impeachment evidence regarding her version of the facts, and she admitted that she took defendant on as her boyfriend after the incident and tried to protect him from the police. But she also testified that Pratt and defendant had gotten into several fights in the past; each had ended up with a black eye on different occasions, and when defendant gets the upper hand in a fight, Pratt calls the police.

> Remember, it's your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each one of you.
>
> As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in the spirit of fairness and frankness.
>
> Naturally, there will differences of opinion. You should each not only express your own opinion but give the facts and the reasons for which you base it. By reasoning the matter out, jurors can often reach agreement.
>
> When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decided it was wrong.
>
> However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

The trial court then essentially went off script and proceeded to inform the jury about the time and expense involved in trying a case, the fact that it would not allow the jury to be deadlocked at that point, and offered some advice:

> Now, maybe I misinterpreted what the "we are" that was scratched there. But, just so you understand, the process to get here—there was, like, the hearing in the district court, there's motions here, we had two panels come in, we've had a court reporter come in from out of town, I'm here, staff's here, we're paying the jurors—because it is an expense, not that we can't do it again, but because it is an expense and it's time consuming, my practice is, is that I don't let you go home the first time you say we can't agree. So we'll go until 4:30, or later, if you want, today. And then we can either come back tomorrow, if we can get everybody here, or we can come back on Monday.
>
> But long and short, we need you to go back in, take a pause, don't do anything—my suggestion is don't do anything for five minutes if—nothing else but read your notes, look at 3.5, look at the exhibits. Don't—don't talk. Then step back, don't argue with each other, just reason it out. And, like I say, we're—I'm here. I got other things going I can do. And close of business is 4:30, but we can go longer if you want. And depending on what things go, we can either get you back here tomorrow or we can bring you in Monday or Tues'—and Tuesday, or whatever, until we have some resolution.
>
> I'm not going to hold you hostage forever, but I'm not going to let you say after two and a half hours of deliberation that you're deadlocked.
>
> So with that, I want you to go back to the jury room. And remember, you have notes, you have your own recollection, what is the evidence? We had Mr. Pratt, we had Ms. Parker, we had Ms. Ackley, and have the eleven exhibits.

> What the lawyers said in final argument, if it isn't supported by one of those four items—the three testimony and the eleven exhibits—it's just gobbledygook. Okay? It's to help—it's to help them. It's—they use it to explain how they see the case. It's not evidence.
>
> Check the evidence. Based on the evidence, you should come—be able to come back with a verdict. I don't know what that verdict is going to be. I haven't made up my mind, and I don't care what the verdict is going to be.
>
> And if you think I'm telling you to go—vote one way or the other, I am absolutely not telling you that. What I'm telling you is read the instructions, apply the instruction that I gave you to the evidence, remember what the evidence is. You have three witnesses and eleven exhibits. That's it.
>
> With that, please go back to jury room and commence your deliberations. It might be time to—it might be nice, as I suggested, it's worked before, take five minutes, don't say anything, just reflect and think about it. Okay?

The jury left the courtroom to resume deliberations at 1:50 p.m.

Outside the presence of the jury, the trial court stated, "I have too many years on the bench. . . . 26 years on the bench. Clearly, one of the jurors is out of sync with the rest of them. You could tell by the glares. Okay? So—and I don't know which way it is." Defendant's counsel said, "They're glaring at you, not us." The court replied, "I don't know which way it is. It doesn't make any difference. But there is clearly at least one juror that's out of sync. And that happens."

B. Second Supplemental Jury Instructions

At 4:12 p.m., outside the presence of the jury, the trial court indicated that it was going to address the jury about continuing its deliberations:

> The jury has not come back. It's 4:12. The courthouse closes at 4:30. I'm going to call them in. I'm going to inform them that they can continue not—till not later than 5:00, or they go home now and report back into the jury room at 9:00 on Monday morning . . . . [I]f they want to continue and try to get a verdict tonight, they can try until 5:00, but at 5:01 we're closing it down, getting their notes, and we're starting over on Monday at 9:00.
>
> Okay? Does that meet your approval?

The prosecutor and defendant's trial counsel indicated that they approved of the trial court's decision.

At 4:16 p.m. the jury entered the courtroom. The trial court stated:

> Okay. Ladies and gentlemen of the jury, since our last discussion, I haven't seen or heard anything from you. So here's where we're at. The

courthouse normally closes at 4:30. On the other hand, if you're close and you think you might get a verdict, we'll allow you to continue until 5:00. *But it's Friday night, we have some people who have plans, it's homecoming in Houghton Lake, and it's—there's a game in Roscommon, and we have coaches and other things that have to do—everybody has a life outside of here.*

So there's two things we can do. You can go back in and continue to not later than 5:00. But at 5:01, we're going to close the court and close the courthouse and excuse you, and you'll come back starting at 9:00 Monday morning.

* * *

The—what was I going to say? On the other hand, you can leave right now if you can't do it. So whoever the foreperson is, you can leave effective . . . . [Emphasis added.]

The following exchange then took place:

Juror D: Judge, I have got a question. If we can't come to a decision, because some of us can't make our mind—our minds up, *should we change our mind just so we can get out of here tonight* or—

The court: Oh, no. No. No.

Juror D: Okay. Well, thank you.

The court: No, you can't do that.

Juror D: Thank you.

The court: That's—no. That—look at your—again—

Juror D: I understand that.

The court: —the instructions. The instructions are there. It says that—and I gave you the instruction, it says: However, none of you should give up your honest beliefs about the weight or the effect of the evidence only because your fellow juror—jurors think—only because of what your fellow jurors think or only for the sake of reaching agreement.

You got to understand, this is the time and date for this trial. We have another trial starting on Tuesday. We have time allocated. It took quite a while to get here. We had—sent out 88 jury—88 or 98 jury—

The clerk: Two hundred and two.

The court: —oh, excuse me—202 summonses for jurors. It cost the county somewhere between four and five thousand dollars just for the jury fees. And—but, you know, we just—we're just going to continue on. I'm not going to—I can't say—because you got to understand, it's not unusual for jurors to say we can't agree. It happens. Eventually, things—somehow things work out. *In all the time I've—26 years on the bench, I can truly—*

Did we have a hung jury here, in this county, in your term?

The prosecution: One.

The court: One. And I can never remember having a hung jury in Ogemaw County. So we've had one here and none in Ogemaw County.

It—what—you—again, you've got to go back in, think about—carefully listen to everyone else, back in, think about—carefully listen to everyone else, talk things over in the spirit of fairness and frankness.

I asked you last time to go back in and not say anything for five minutes, just think. Did you do that or did you start arguing again?

Juror D: No, we didn't do that.

Juror R: We started arguing.

The court: All right. So naturally, there will be differences of opinion. You should each not only express your own opinion but give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.

When you continue deliberations, don't hesitate to rethink your own views and change your opinion if you decide it was wrong. However, none of you should give up your honest beliefs about the weight of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

That—you're not following your oath.

Juror C: *That says it all.*

The court: Sometimes deadlock juries occur. I can just tell you they are rare and infrequent. *And in 26 years, in two counties, once.*

This is a case with three witnesses and eleven exhibits, and you're telling me you're hung? Each one of you should go back in there, reexamine your positions and think, look at the things, and remember you're under oath. You took an oath.

Three witnesses, eleven exhibits, took less than six hours to get it done, and you're hung? I don't believe it. I don't believe it.

Each one of you should look into your own mind, look into your conscience, and think.

So go back in the jury room. Let me know whether you want to continue to deliberate until 5:00 or you want to go home now. Either makes no difference. [Emphasis added.]

The jury left the courtroom to resume deliberations at 4:21 p.m.

Outside the presence of the jury, the trial court and counsel had the following exchange:

The court: Okay. I, quite frankly, don't know how to explain this. I've never—it's hard to imagine what's going on in their minds. Clearly, there is an impasse. One of the jurors—I thought it was one and it's—they glanced at another one now. I don't know what's going on.

But—that's where we're at. So let's just hang around here for a few minutes. I suspect they're going to want to go home. So why don't we wait until—five or six minutes, and see.

* * *

The court: By the way, for the record, Mr. Jernigan [the prosecutor], you heard what I said. Do you want to call them back in and add anything or not?

The prosecution: No, Your Honor.

The court: Mr. Brabant [defense counsel]?

Defense counsel: No.

The court: Isn't it ridiculous?

Defense counsel: I don't know. I can't read them.

The court: I can't fathom what the problem is. They either believe the witnesses or they don't. If they don't, it's not guilty. If they believe—if they don't believe her, it's guilty. If they believe her, it's not guilty. There's—I can't—you know, it's a he said, she said. They've got to believe one or the other.

But my instruction—you heard my instruction. I said I want them kept—if I'm not here, I want them kept through Monday and possibly into Tuesday. It costs thousands of dollars to do this.

The prosecution: Yes, Your Honor.

> *The court*: I just don't think we should waste our time. Because we could have been trying the case and wouldn't have had to bring Judge Corwin in for the other case.

At 4:44 p.m., the trial court stated, "We just got a note that says, 'We are ready.' Honestly, I don't know if that means we're ready to go home, we're ready for a break, or we're ready with a verdict form." Before the jury was brought in, the court stated, "I guess I'm getting old—old and frustrated. Early—easily frustrated. Or maybe I'm not—maybe I'm—I usually feel patient; I just don't have it today." The jury then entered and delivered a guilty verdict.

II. ANALYSIS

Defendant argues on appeal that the trial court's supplemental instructions after the jury began deliberating were unduly coercive in violation of his rights to due process and a fair trial. Based upon the totality of the circumstances in this case, we agree.

Defendant's argument is unpreserved.[2] Unpreserved constitutional issues are reviewed for plain error. *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012). Under the plain error standard of review,

> a defendant is not entitled to relief unless he can establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id*.]

In *People v Sullivan*, 392 Mich 324, 342; 220 NW2d 441 (1974), our Supreme Court adopted the use of ABA standard jury instruction 5.4 as an appropriate instruction to provide in the event of a deadlocked jury. The Court cautioned that "[a]ny substantial departure therefrom shall be grounds for reversible error." *Id.* Michigan's Model Criminal Jury Instructions have incorporated the standard adopted in *Sullivan*. *People v Pollick*, 448 Mich 376, 382 n 12; 531 NW2d 159 (1995). CJI2d 3.12 instructs the jury:

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[2] The prosecution argues that defendant waived his claim of error. "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). We find that defense counsel did not affirmatively express satisfaction with the trial court's instructions. Concerning the first supplemental instruction, although trial counsel agreed with the paragraphs of CJI2d 3.12 that the trial court read to the jury, trial counsel did not clearly express satisfaction with the trial court's additional commentary. Regarding the second supplemental instructions, although counsel stated that he did not have anything to add to the instructions, counsel never clearly expressed satisfaction with the trial court's commentary. Thus, we find defense counsel's lack of objection to the instructions to constitute mere forfeiture, rather than waiver. *Id.* at 504 n 27.

(1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.

(2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.

(3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.

(4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.

(5) If you think it would be helpful, you may submit to the bailiff a written list of the issues that are dividing or confusing you. It will then be submitted to me. I will attempt to clarify or amplify the instructions in order to assist you in your further deliberations.

(6) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.

(7) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

The trial court need not read the above-instruction verbatim to the jury, but a substantial departure from the instructions can warrant reversal. *Pollick*, 448 Mich at 383. See also *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984). "[T]he test for determining whether instructional language substantially departs from the ABA standard is whether the instruction is unduly coercive . . . ." *Pollick*, 448 Mich at 383. See also *Hardin*, 421 Mich at 316 ("Whether any deviation . . . is substantial in the sense that reversal is required depends upon whether the deviation renders the instruction unfair because it might have been unduly coercive."). In *Hardin*, 421 Mich at 316, our Supreme Court reiterated:

> The optimal instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision. If the instruction given can cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement, then that charge should not be used. [Citation and quotation marks omitted.]

In determining whether an instruction was coercive, we look to whether the language employed by the trial court includes "pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that" the trial court's instructions were coercive. *Id.* at 315

(citation and quotation marks omitted). "Also relevant is whether the court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *Id.* at 316. In addition, where the trial court fails to inform the jury that its deliberations can continue on a subsequent day if the jurors are unable to reach agreement, the instructions are unduly coercive. *People v Malone*, 180 Mich App 347, 350-352; 447 NW2d 157 (1989). Additionally, an instruction "that calls for the jury, as part of its civic duty, to reach a unanimous verdict and which contains the message that the failure to reach a verdict constitutes a failure of purpose, is a substantial departure . . . because it tends to be coercive." *Hardin*, 421 Mich at 316, citing *People v Goldsmith*, 411 Mich 555, 561; 309 NW2d 182 (1981). In *Goldsmith*, 411 Mich at 558, the trial court instructed the jury that if it failed to reach a verdict, it failed its purpose, and that "[e]ach time such an indecisive jury fails, ammunition is given to those who oppose the jury system as we know it . . . ." In determining whether an instruction was coercive, this Court can look at the amount of time it took the jury to reach its verdict after it was given the instruction. *People v Bookout*, 111 Mich App 399, 403; 314 NW2d 637 (1982). This Court can also look to whether an appropriate, non-coercive instruction was given after the objectionable instruction was given. See *Hardin*, 421 Mich at 318.

Here, the trial court gave a number of instructions that were objectionable, as well as a number of appropriate instructions. For instance, in the first supplemental instructions, the trial court began by instructing the jury in accordance with CJI2d 3.12. The trial court also informed the jury that it could return on a subsequent day to continue deliberations. However, the trial court made coercive comments by informing the jury about "the process to get here[,]" including that a court reporter came in from out of town, that two panels came in, that the judge and the staff were there for the trial, and that the jurors were being paid. Nonetheless, after informing the jury of the costs of the proceedings, the trial court was quick to point out, "not that we can't do it again[.]"

The trial court continued this theme of mixing proper instructions with improper ones after it called the jury back into the courtroom a few hours later. The court began by informing the jury that it was homecoming in Houghton Lake, that there was a football game in Roscommon, and that "everybody has a life outside of here." Still, this comment was couched in the trial court's comment about how deliberations could continue until 5:00 p.m., and that if the jury was unable to reach a resolution by that time, it could continue deliberations the following Monday. Then, in response to a question by a juror— who indicated that "some of us can't make up our mind" and asked if they should "change our mind[s] just so we can get out of here tonight"[3]—the trial court unequivocally told jurors that they should not compromise their views simply for the sake of reaching agreement. Immediately after doing so, however, the trial court reminded jurors of the costs of trial, explaining that the county had sent out 202 summons for jurors, spent "somewhere between four and five thousand dollars just for the jury fees[,]" and

[3] The juror's remark implies that she was feeling pressured by the trial court's comments regarding it being a Friday night and that everybody had "a life outside" of the courtroom and other things to do with their time.

informed the jury that it had experienced only one hung jury in its 26 years on the bench while presiding over two counties.

The trial court followed these instructions by instructing the jurors in accordance with CJI2d 3.12, most notably informing them that they should not be afraid to express their opinions and give facts and reasons for their opinion. The trial court also informed jurors that they should not give up their honest beliefs about the weight of the evidence simply for the sake of agreement. However, upon interjection by one of the jurors, specifically saying "[t]hat says it all,"—which might imply that the juror felt vindicated by the judge's instruction not to give up her honest beliefs—the tenor of the trial court's instructions changed yet again. The trial court once again pointed out how exceedingly rare it was for a jury to be deadlocked, implying that this jury would be a failure if it could not reach a verdict. The trial court's remarks then bordered on disdain over the fact that the jury had not been able to resolve what the court deemed to be a simple, straightforward case:

> *This is a case with three witnesses and eleven exhibits, and you're telling me you're hung?* Each one of you should go back in there, reexamine your positions and think, look at the things, and remember you're under oath. *You took an oath.*
>
> *Three witnesses, eleven exhibits, took less than six hours to get it done, and you're hung? I don't believe it. I don't believe it.*
>
> Each one of you should look into your own mind, look into your conscience, and think.
>
> So go back in the jury room. Let me know whether you want to continue to deliberate until 5:00 or you want to go home now. Either makes no difference. [Emphasis added.]

Within 23 minutes of the judge's remarks, the jury returned its verdict. When viewed as a whole, and in light of the timing with which the jury reached its verdict, we find that the trial court's instructions were unduly coercive. The trial court gave a smattering of improper instructions, culminating in an instruction that shamed the jurors for being unable to reach a verdict. Although a majority of the trial court's improper instructions were followed by proper instructions that dissipated, in part, the harm caused by the instructions, see *Hardin*, 421 Mich at 318, the trial court gave the most coercive instructions immediately before the jury began deliberating for the final time and did not give proper instructions afterwards. In its final comments given before the jury reached its verdict, the trial court emphasized that in its 26 years on the bench, it only had one hung jury. Then, the trial court noted that the evidence in this case was not extensive, and repeated that the jury took an oath to return a verdict. By repeatedly reminding the jury that it "took an oath," the trial court called for the jury, as part of its civic duty, to reach a verdict. Such a comment is evidence of coercion. See *id.* at 316; *Goldsmith*, 411 Mich at 561. The coercive nature of the trial court's instructions intensified when it noted that the evidence presented was not extensive, that trial was short, and that it could not believe the jury was unable to reach a verdict. Such language implied that the case was simple and that it

was beyond belief that the jurors were unable to reach a verdict. These comments shamed the jurors by informing them that it was unbelievable they were unable to reach a consensus in a matter that was not complex. Comments that shame the jury or are meant to embarrass jurors are evidence of coercion. See *Hardin*, 421 Mich at 315; *People v Strzempkowski*, 211 Mich 266, 267-268; 178 NW 771 (1920). Here, in light of the totality of the trial court's comments, we find the trial court's instructions could have caused the jurors to "abandon [their] conscientious dissent and defer to the majority solely for the sake of reaching agreement . . . ." *Hardin*, 421 Mich at 316 (citation and quotation marks omitted).

The timing with which the jury reached its verdict after receiving the second supplemental instructions supports our finding that the trial court's comments were coercive. See *Bookout*, 111 Mich App at 402 (explaining that the length of a jury's deliberations subsequent to receiving an instruction can be indicative of whether the instruction was coercive). At the time it received the second supplemental instructions, the jury had deliberated for more than five hours and was unable to reach a consensus. Yet, after being told that the case was simple and that the trial court could not believe that the jurors were unable to reach a verdict, something they had taken an oath to do, and that the trial court had only witnessed one deadlocked jury in 26 years, the jury returned a verdict in approximately 20 minutes. Where the trial court repeatedly gave objectionable instructions, culminating in a set of instructions in which it shamed the jury, we find the timing of the jury's verdict demonstrates that the instructions were unduly coercive. See *id.*

The circumstances in this case are distinguishable from those in *People v Rouse*, 272 Mich App 665, 676; 728 NW2d 874 (2007) (JANSEN, J, dissenting), overruled *People v Rouse*, 477 Mich 1063 (2007). In *Rouse*, Judge Jansen's dissent, which was later adopted by our Supreme Court, found that the length of the jury's deliberations after the complained of jury instruction suggested that the instructions were not unduly coercive. In *Rouse*, the instruction with which the defendant took issue was as follows:

> [I]f you are not truly able to reach an agreement on this in compliance with the instruction that I will give you, it will result in everybody coming back, the victim and the defendant included, and going through this entire process again with another jury. This is a difficult situation. It is, it is, you know, in terms of the justice that we are rendering in this case, I think is somewhat compromised if we are unable to reach a verdict on way or the other in this case. [*Id.* at 667 (emphasis omitted).]

Immediately after giving that instruction, the trial court instructed the jury in conformance with CJI2d 3.12. *Id.* at 668. The majority found that the trial court's instructions were coercive because they conveyed to jurors that justice would be compromised if they failed to reach a verdict; thus, the majority reasoned that the instruction called on the jury to reach a verdict as part of its civic duty. *Id.* at 675.

Judge Jansen dissented, noting that the trial court read CJI2d 3.12 immediately after giving the questionable instruction. *Id.* at 676 (JANSEN, J, dissenting). Judge Jansen also noted that the jury continued to deliberate for approximately five hours after receiving the instructions

noted above. *Id.* Thus, Judge Jansen concluded that the instructions were not coercive. *Id.* at 676-677.

We find *Rouse* to be distinguishable, both in terms of the length of the jury's deliberations and in terms of the nature of the instructions given. Although the jury in the case at bar deliberated for approximately two hours after receiving the initial set of instructions from the trial court, it deliberated only 23 minutes after receiving the second supplemental instructions. We find the time period after the jury received the second supplemental instructions to be the most important time period in this case. Indeed, at the time the trial court gave the second supplemental instructions, Juror D indicated that the jury was still deadlocked. Moreover, the second supplemental instructions contained the most coercive instructions and ended with improper coercive language in the form of embarrassing or shaming the jury for being deadlocked. Where the jury returned its verdict so soon after these improper remarks by the trial court, we find that the case is materially distinguishable from *Rouse*.

For the reasons articulated above, defendant satisfies the first two steps in a plain error analysis because the trial court's instructions constituted an error that was plain or obvious. We also find that the error affected defendant's substantial rights, i.e., it was outcome determinative. The timing of the jury's verdict, particularly in light of the fact that Juror D indicated the jury had been deadlocked a mere 23 minutes before it reached its verdict, suggests that the coercive instructions affected the jury's verdict. While the timing is not conclusive, it certainly appears that the coercive instructions "could have been decisive of the outcome." *Vaughn*, 491 Mich at 666 (citation and quotation omitted).

For the last step in a plain error analysis, we must exercise our discretion, and only grant a new trial if the defendant "'is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 675, quoting *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Here, defendant does not claim actual innocence; thus, he must demonstrate that the coercive instructions affected the fairness, integrity, or public reputation of the judicial proceedings. We find defendant satisfies his burden in this case. This Court has held that coercive instructions deny a defendant the right to a fair trial. *Malone*, 180 Mich App at 352, citing *Strzempkowski*, 211 Mich at 268. Moreover, the United States Supreme Court has recognized that coercive instructions affect the public interest in obtaining fair judgments. *Arizona v Washington*, 434 US 497, 510; 98 S Ct 824; 54 L Ed 2d 717 (1978). Accordingly, we find that a series of coercive instructions that culminated in the trial court shaming the jury into reaching a verdict affected the fairness, integrity, and public reputation of judicial proceedings. As such, we reverse and remand for a new trial.

Because we conclude that the trial court's supplemental instructions require reversal, we decline to consider defendant's remaining arguments.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause